STATE OF MICHIGAN

COURT OF APPEALS

MEADOWS VALLEY, LLC, a Michigan Limited Liability Company, Plaintiff-Appellee/Cross-Appellant, v VILLAGE OF REESE, a Michigan Municipal Corporation, Defendant-Appellant/Cross-Appellee.	UNPUBLISHED June 11, 2013 No. 309549 Tuscola Circuit Court LC No. 09-25554-CZ

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In this appeal, defendant appeals by right from the opinion and order of the trial court granting plaintiff's motion for summary disposition on the issue of whether defendant's "ready to serve" charge for sewer usage was an impermissible tax imposed in violation of the Michigan Constitution, and the subsequent entry of a judgment in favor of plaintiff. In the cross-appeal, plaintiff appeals the trial court's award of damages in the amount of $8,910.00. We reverse the trial court's grant of summary disposition and vacate the subsequent judgment; this decision renders plaintiff's cross-appeal moot.

I. BASIC FACTS AND PROCEDURAL HISTORY

The facts in this case are undisputed. Plaintiff owns and operates a mobile home park located within the boundaries of defendant. Village of Reese Ordinance Number 10 is "an ordinance regulating the use of public and private sewers and drains; the installation and connection of building sewers and the discharge of waters and wastes into the public sewer system . . . ." The dispute in the instant case centers around defendant's imposition of a "ready to serve" charge on plaintiff of $18 per quarter per mobile home unit. The charge is imposed pursuant to Amendment #10H to the ordinance, which reads in relevant part:

> Rate Schedule-Village of Reese, Michigan Sanitary Sewer System
>
> Customer Classification: Mobile Home Park

QUARTERLY SANITARY SEWER CHARGE IN $ = $18.00 + 1.20 MU GAL.[1]

THE CALCULATION FOR A MOBILE HOME PARK SHALL BE CALCULATED QUARTERLY BASED UPON USAGE IN THOUSAND GALLONS. UNITS SHALL BE BASED ON THE WHOLE PARK AND CHARGED AT $18.00 READY TO SERVE (RTS) + $1.20 PER THOUSAND (MU) GALLON AS REPORTED BY THE BLUMFIELD REESE WATER AUTHORITY. WHILE THE $18.00 READY TO SERVE CHARGE SHALL BE BASED ON THE TOTAL NUMBER OF LOTS IN THE MOBILE HOME PARK.

It is undisputed that defendant charged the fee for all sites connected to the sewer system, even if they are presently unoccupied. In August of 2009, plaintiff filed a complaint seeking declaratory and injunctive relief, as well as damages, against defendant. Relative to this appeal, plaintiff alleged that the "ready to serve" charge was a disguised tax in violation of the Headlee Amendment, Const 1963, art 9, § 31.

Following discovery, the parties filed cross-motions for partial summary disposition on the issue of plaintiff's challenge to the "ready to serve" charge. The trial court decided the motions without oral argument, granting plaintiff's motion for partial summary disposition in an opinion and order dated March 2, 2011. The opinion stated in relevant part:

> In considering the pleadings in the light most favorable to the Defendant this Court concludes that Defendant's claims are clearly unenforceable as a matter of law. Plaintiff's motion for summary disposition should be granted. This Court finds the Defendant's "ready to serve" charge pursuant to the Village of Reese, Sewer Ordinance No. 10, is a tax violative of the Headlee Amendment to the Michigan Constitution. The "ready to serve" charge is not a voluntary payment made for measurable services because every one of the Plaintiff's 126 lots of the Park are mandatorily charged despite the number of unoccupied. Moreover, the revenue collected from the "ready to serve" charge is not used for the operation and maintenance of the Plaintiff's private sewer lines, but rather for the discharge from Plaintiff's entire Park to the Defendant's public sewer system.

The trial court ordered that judgment may enter in favor of plaintiff for $8,910.00. On March 26, 2012, a judgment was entered by the trial court closing the case. This appeal and cross-appeal followed.

[1] "MU Gal" refers to "the number of thousand gallon units of potable water used as reported on the water authority billing statement for the previous winter quarter."

II. STANDARD OF REVIEW

Whether a "service charge . . . is a 'tax' or a 'user fee' is a question of law that this Court reviews de novo." *Bolt v City of Lansing*, 459 Mich 152, 158; 587 NW2d 264 (1998). This Court also reviews a trial court's grant of a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "This Court presumes that ordinances are constitutional, and the party challenging the validity of the ordinance has the burden of proving a constitutional violation." *People v Rapp*, 492 Mich 67, 72; 821 NW2d 452 (2012), citing *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

III. ANALYSIS

The Headlee Amendment, Const 1963, art 9, § 31, provides in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.

It is undisputed in the instant case that if the "ready to serve" charge is a tax, it "unquestionably violates the Headlee Amendment," as Ordinance 10 was not adopted in conformance with Amendment. See *Bolt*, 459 Mich at 158. On the other hand, "if the charge is a user fee . . . the charge is not affected by the Headlee Amendment." *Id*. at 159.

In *Bolt*, our Supreme Court faced a constitutional challenge to a City of Lansing ordinance that provided for a "storm water service charge" imposed on all parcels of real property located within the city. *Id*. at 155. The service charge was adopted to help defray the expenses involved in the construction and administration of a new combined sewer overflow system for the system. *Id*. The service charge was assessed based on a formula that attempted to calculate each parcel's storm runoff, although residential parcels of less than two acres were charged a flat fee. *Id*. The service charge was not voluntary and the ordinance provided for escalating penalties for nonpayment, as well as a system for administrative appeals of the rate assessments. *Id*. at 157.

The Court began by noting that "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Id*. at 160. Adding to the difficulty, "the Headlee Amendment fails to define either the term 'tax' or 'fee[.]'" The Court then noted that its interpretation of the amendment was guided by the "rule of common understanding," which has been stated as follows:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to*

> *the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed." [*Bolt*, 459 Mich at 152, quoting *Traverse School Dist v Atty Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley's Const Lim 81 (emphasis in original).]

With this guiding principal in mind, the Court noted that "generally, a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax' on the other hand, is designed to raise revenue." *Id*. at 161 (citations omitted). The Court then identified

> three primary criteria to be considered when distinguishing between a fee and a tax. The first criterion is that a user fee must serve a regulatory purpose rather than a revenue-raising purpose. A second, and related, criterion is that user fees must be proportionate to the necessary costs of the service. . . . In *Ripperger*, this Court articulated a third criterion: voluntariness. [*Id*. at 161-162 (citations omitted).]

Having articulated these criteria, the Court found that the purpose of the fee, to a large extent, was "an investment in infrastructure as opposed to a fee designed simply to defray the costs of a regulatory activity." *Id*. at 163. Therefore, the ordinance failed "both the first and second criteria." *Id*. The Court also found that the "charges imposed did not correspond to the benefits conferred" because seventy-five percent of the property owners in the city were already served by a storm and sewer system, and "[u]nder the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction." *Id*. at 165. Additionally, the charge applied to all property owners, "rather than only to those who actually benefit." *Id*. The Court concluded that "the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id*. at 166.

"Buttress[ing]" the Court's finding was "the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the city, not only property owners." *Id*. at 166. Additionally, the ordinance failed to significantly regulate surface-water runoff in support of the stated goal of the ordinance. *Id*. at 166-167. Finally, the Court noted that the ordinance "lacks any element of volition." *Id*. at 167.

However, the Court in *Bolt* made clear that it was *not* foreclosing the possibility that a city could implement a valid storm water or sewer charge without violating the Headlee Amendment:

> A proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally shared by other members of society. Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may

> properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax. [*Id*. at 164-165 (citations omitted).]

Shortly after *Bolt*, this Court stated that "these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

More recently, this Court in *Wheeler v Charter Twp of Shelby*, 265 Mich App 657; 697 NW2d 180 (2005), determined that an ordinance that implemented a charge for solid waste disposal was not a tax in violation of the Headlee Amendment. The ordinance in question was promulgated for the purposes of collection and disposal of solid waste, thereby satisfying the first *Bolt* criterion by "clearly serv[ing] regulatory purposes, i.e., to ensure the efficient removal of waste products and to protect the public health." *Id*. at 665.

The collection and disposal charge authorized by the ordinance also satisfied the second criterion because "the waste hauler bills customers directly and receives all revenues generated by the fee to offset the costs of collection and disposal. In this regard, the charge bears the classic characteristics of a user fee." *Id*. With respect to the second *Bolt* criterion, this Court noted that "[t]his Court presumes the amount of the fee to be reasonable, 'unless the contrary appears on the face of the law itself or is established by proper evidence.'" *Id*. at 666, quoting *Graham*, 236 Mich App at 154-155. This Court further rejected plaintiff's claim that the fee was disproportional to the benefit bestowed because each resident was charged a flat fee rather than an amount based on the amount of solid waste generated, noting that the plaintiff offered "no evidence of any alternative means of more accurately establishing the cost of collection and disposal for each residence." *Id*.

This Court in *Wheeler* did note that the ordinance at issue failed the third *Bolt* criterion, as it was not voluntary.

> Nevertheless the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax. The first two criteria so clearly demonstrate the collection and disposal charge is a permissible user fee and not an impermissible tax; the decision of the township to place its policing authority behind the enforcement of the ordinance does not render the use fee a tax for purposes of the Headlee Amendment. [*Id*. at 666-667.]

Here, we conclude that the ordinance at issue, like the ordinance in *Wheeler*, fulfills the first two *Bolt* criteria. First, the ordinance at issue is an ordinance "regulating the use of public and private sewers and drains; the installation and connection of building sewers, and the discharge of waters and wastes into the public sewer system." Thus, rather than having the purpose of raising revenue for a large capital improvement, or avoiding the payment of environmental penalties, as in *Bolt*, we conclude that the ordinance's purpose is regulatory, i.e., the regulation of the amount of sewage introduced into the public sewer system, for the purposes of health and safety. See *Wheeler*, 265 Mich App at 665; see also *Graham*, 236 Mich App at

152 ("[b]y exacting [a] fee for connection to the water system, the purpose is clearly to regulate and control the use and distribution of water provided by the regulatory system.")

Additionally, this Court has noted that "the inquiry into the first two factors is closely intertwined." *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 415; 671 NW2d 572 (2003). This is a matter of simple logic; if the fees charged are in proportion to the actual costs of the services provided, then they "cannot be regarded as a means of producing revenue" and therefore support the conclusion that the purpose of the charge is regulatory rather than revenue-raising. *Id*. at 415-416. Thus, in *Wheeler*, this Court found the second *Bolt* factor to be satisfied when all revenues generated by the fee were used to offset the costs of collection and disposal. 265 Mich at 665. Similarly, and on all fours with the instant case, the defendant in *Mapleview Estates* presented evidence that the fees charged for connecting a site to the water and sewer systems were actually "less than the actual costs of providing the services." 258 Mich App at 415.

Here, defendant presented the trial court with financial statements from March 31, 2003 to March 31, 2010. Although the 2003 and 2004 statements reference an "Enterprise Fund" without making specific reference to the "Sewer Fund," the later years' statements are entitled "Major Enterprise Fund/Sewer Fund." In any case, the financial statements show that the operating expenses exceeded the charges for services every year, and that the fund thus sustained a loss of both operating income and net income each year. Additionally, although plaintiff endeavors to characterize the "ready to serve" charge as a flat fee, it appears from the face of the ordinance that the fee is composed of a minimum charge of 18 dollars plus an amount based on usage. Plaintiff did not present the trial court with evidence "of any alternative means of more accurately establishing the cost of collection and disposal for each residence." See *Wheeler*, 265 Mich App at 666. Therefore, we presume, as in *Mapleview Estates* and *Wheeler*, that the fee charged in the instant case is regulatory and proportional to the service rendered.

The trial court stated that "the revenue collected from the 'ready to serve' charge is not used for the operation and maintenance of the Plaintiff's private sewer lines, but rather for the discharge from Plaintiff's entire Park to the defendant's public sewer system." While a true statement, we do not see how that fact supports the conclusion that the ordinance fails the first two *Bolt* criteria. In *Bolt*, our Supreme Court found the majority of property owners in the city received no particular benefit in exchange for the charge, because they were already served by another storm and sewer system for which they had paid. 459 Mich at 165. Here, as in *Wheeler* and *Mapleview Estates*, plaintiff receives the benefit of being able to attach its private sewer lines to, and to dispose its waste into, a public system. *Wheeler*, 265 Mich App at 665; 258 Mich App at 415-416. This is both a "benefit [that] is not generally shared by other members of society" and, as stated above, a fee that "reflects the actual costs of use." *Bolt*, 459 Mich at 164-165. We therefore find that the trial court erred in determining that the "ready to serve" charge did not satisfy the first two *Bolt* criteria.

We agree that the charge is not voluntary, to the extent that one may not own property in the Village of Reese and not connect to the public sewer system. The ordinance requires all owners of "houses, buildings, or properties used for human occupancy . . . " to connect to the public sewer system. There is "[a]bsolutely no element of volition" involved. *Wheeler*, 265 Mich App at 666. However, we do not find this factor dispositive in light of the clear

satisfaction of the first two *Bolt* factors. Additionally, although plaintiff makes much of the fact that currently unoccupied units are charged the minimum fee, this is no different than an unoccupied house that is not yet sold or an empty apartment that is not yet rented. The instant case is not analogous to *Bolt*, 459 Mich at 165, where all property owners were required to fund a large property improvement regardless of whether they would receive a benefit from that improvement (other than the generalized benefit to society). Rather, plaintiff receives the benefit of use of the public sewer system, notwithstanding that some of the units within its park are unoccupied.

We therefore conclude that the trial court erred in determining that the "ready to serve" charge violated the Headlee Amendment. Because we reverse the trial court's grant of summary disposition and vacate the judgment entered upon it, we decline to address plaintiff's challenge to the amount of damages awarded as moot. See *City of Warren v City of Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004).

Reversed and remanded for entry of summary disposition for defendant. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra